FILED
AUG 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-159

IN THE

Supreme Court of the United States

October Term, 1982

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, INC.; FIRESTONE TIRE AND RUBBER COMPANY, INC.; COLE MUFFLER, INC.; CARROLLS DEVELOPMENT CORPORATION, doing business under the name and style of CINEMA EAST AND MINI ONE THEATRES; SLOTNICK ENTERPRISES, INC., doing business under the name and style of DeWITT DRIVE IN; FRANKLIN FURNITURE DeWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of ROTH BROS. MANOR HOUSE; DANA ELSTON, doing business under the name and style of INTERNATIONAL HOUSE OF PANCAKES; BRANG CO., INC.; MICHAEL DEY LINCOLN-MERCURY, INC.; MO-RU OF DeWITT, INC., doing business under the name and style of BURGER KING; ENZA MUFFLERS, INC., doing business under the name and style of MIDAS SHOPS; DeWITT HIGHWAY HOTEL, INC., doing business under the name and style of DeWITT RANCH MOTEL; HOWED DISTRIBUTORS, INC., doing business under the name and style of KIDS TOWN; MACARTNEY & TOLLES, INC., doing business under the name and style of KENTUCKY FRIED CHICKEN; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DEWITT, INC.; SYRACUSE DONUT, INC., doing business under the name and style of DUNKIN DONUTS; DAVID F. KROFT, doing business under the name and style of WHALE OF A WASH OF DeWITT; THE WARDROBE FORMALWEAR, INC.; DeWITT CAR WASH, INC.; PETER'S GROCERIES, INC.; CAPTAIN AHAB'S SEAFOOD GALLEY, INC.; MAY ITALIA, INC., doing business under the name and style of CHEF ITALIA RESTAURANT; GREGORY BANOS, doing business under the name and style of DeWITT PLAZA; COLOR TILE SUPERMARTS, INC.; DeWITT BICYCLE CO., INC.; HELENE KAZACOS, doing business under the name and style of CAROUSEL HAIR STYLISTS; DeWITT SPORT SHOP, LTD.; COMPUTER SHOP OF SYRACUSE, INC.; LUND'S MEN'S SHOP, INC.; M. GOLDBERG & SONS—SYRACUSE, INC.; TILE & CARPET TOWN EAST, INC.; B.W. STREETER, INCORPORATED, doing business under the name and style of ARBY'S; HARVEY SHURE, doing business under the name and style of H.J.S. ENTERPRISES (HARVEY'S SHOPPING PLAZA); RITE AID OF NEW YORK, INC.; and FRIENDLY ICE CREAM CORP.,

Appellants,

vs.

TOWN OF DeWITT,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Motion to Dismiss Appeal or Affirm Judgment Pursuant to Rule 16

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United States Constitutional Provisions.

First Amendment, United States Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis added)

Fifth Amendment, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."* (Emphasis added)

Fourteenth Amendment, Section 1, United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."* (Emphasis added)

New York State Constitutional Provisions.

§6. [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such

matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

Amended Nov. 8, 1938; Nov. 8, 1949; Nov. 3, 1959; Nov. 6, 1973, eff. Jan. 1, 1974.

§8. [Freedom of speech and press; criminal prosecutions for libel]

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

§11. [Equal protection of laws; discrimination in civil rights prohbited]

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

Statutory Provisions.

Chapter 53, Section 53-30, Town Code of the Town of Dewitt, Onondaga County, New York

The text of Chapter 53 is set forth in the Appendix hereto.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

No. 82-159

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, Inc.; FIRESTONE TIRE AND RUBBER COMPANY, Inc.; COLE MUFFLER, Inc.; CARROLLS DEVELOPMENT CORPORATION, doing business under the name and style of Cinema East and Mini One Theatres; SLOTNICK ENTERPRISES, Inc., doing business under the name and style of DeWitt Drive In; FRANKLIN FURNITURE DEWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of Roth Bros. Manor House; DANA ELSTON, doing business under the name and style of International House of Pancakes; BRANG CO., Inc.; MICHAEL DEY LINCOLN-MERCURY, Inc.; MO-RU OF DEWITT, Inc., doing business under the name and style of Burger King; ENZA MUFFLERS, Inc., doing business under the name and style of Midas Shops; DEWITT HIGHWAY HOTEL, Inc., doing business under the name and style of DeWitt Ranch Motel; HOWED DISTRIBUTORS, Inc., doing business under the name and style of Kids Town; MACARTNEY & TOLLES, Inc., doing business under the name and style of Kentucky Fried Chicken; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DEWITT, Inc.; SYRACUSE DONUT, Inc., doing business under the

name and style of Dunkin Donuts; DAVID F. KROFT, doing business under the name and style of Whale of a Wash of DeWitt; THE WARDROBE FORMALWEAR, Inc.; DEWITT CAR WASH, Inc.; PETER'S GROCERIES, Inc.; CAPTAIN AHAB'S SEAFOOD GALLEY, Inc.; MAY ITALIA, Inc., doing business under the name and style of Chef Italia Restaurant; GREGORY BANOS, doing business under the name and style of DeWitt Plaza; COLOR TILE SUPERMARTS, Inc.; DEWITT BICYCLE CO., Inc.; HELENE KAZACOS, doing business under the name and style of Carousel Hair Stylists; DEWITT SPORT SHOP, Ltd.; COMPUTER SHOP OF SYRACUSE, Inc.; LUND'S MEN'S SHOP, Inc.; M. GOLDBERG & SONS—SYRACUSE, Inc.; TILE & CARPET TOWN EAST, Inc.; B. W. STREETER, INCORPORATED, doing business under the name and style of Arby's; HARVEY SHURE, doing business under the name and style of H.J.S. Enterprises (Harvey's Shopping Plaza); RITE AID OF NEW YORK, Inc.; and FRIENDLY ICE CREAM CORP.,

Appellants,

vs.

TOWN OF DEWITT,

Appellee.

Motion to Dismiss Appeal or Affirm Judgment Pursuant to Rule 16.

Object of the Motion.

The object of this motion is to dismiss the Appellants' appeal or affirm the judgment of the New York Court of Appeals pursuant to Rule 16.1(b) and (d) of the Rules of this Court in that the Appellants lack standing to raise certain of the issues raised on appeal, and that the remaining issues either fail to present a substantial federal question, were determined below on an adequate non-federal basis or were fully and correctly determined below as controlled by this Court's recent decision in *Metromedia, Inc., et al., v. The City of San Diego, et al.*, 453 U.S. 490 (1981).

The Facts.

1. On March 26, 1973, the Town of DeWitt, a suburban community in Upstate New York, enacted an amendment to Section 53-30 of the DeWitt Town Code, which commonly has been referred to as the "Sign Ordinance". This amendment, which is found in Appendix pages 1-7, regulates only the location, time and manner of signs within the Town of DeWitt.

2. Each of the Appellants operates a commercial business within either a Business Transitional, Business or Industrial District within the Town of DeWitt. In such Districts, the Sign Ordinance, as it relates to the issues at bar, namely the use of free-standing signs, permits the following:

(a) One identification sign for each primary on premises business conducted, attached to a street facade of the

building housing such business in Business Transitional Districts (§ 53-30(C) (2)).

(b) Not more than three identification signs for each primary on premises business conducted, attached to a street facade of the building housing such business in the less restricted Business or Industrial Districts (§ 53-30 (D) (2) and (E) (2)).

(c) Any signs permitted in residential districts which include free standing signs which are temporary or of a temporary nature including those of a political, civic, philanthropic, educational or religious organization (§ 53-30(B) (2), (3), (6) and (8)).

(d) Freestanding identification sign(s) in any non-residential districts for shopping centers of over six establishments or 50,000 square feet, enclosed shopping malls or industrial activities (§ 53-30 (A) (11)).

3. Said Amendment also provided for an amortization period of four years, nine months for non-conforming signs (§ 53-30 (a) (10)) from the date of enactment, that being March 26, 1973 until January 1, 1978.

4. In December of 1977, the month prior to the end of the amortization period, various merchants in the Town of DeWitt requested the Town Board to reconsider its position on non-conforming free standing signs. At that time, the Town Board voted to stay enforcement of the Ordinance, ultimately until June 1, 1978. After a public hearing on June 26, 1978, the Town Board determined not to effect any change in the Sign Ordinance.

5. On or about June 8, 1978, certain merchants received notices of violation of said Sign Ordinance, the failure to

comply with which resulted in the issuance, in early July, 1978, of Appearance Tickets on said violations.

6. On or about July 25, 1978, Appellants commenced an action in New York State Supreme Court, Onondaga County seeking a judgment declaring the DeWitt Town Code § 53-30 unconstitutional in contravention of Article 1 Sections 6, 8 and 11 of the New York Constitution and the First and Fourteenth Amendments to the United States Constitution, and also sought and received preliminary injunctive relief.

7. After joinder of issue, and on or about February 14, 1979, Appellees made a motion for summary judgment dismissing Appellants' Complaint.[1]

8. By decision dated August 17, 1979, and order dated December 6, 1979, New York Supreme Court, Onondaga County, Special Term (Tenney, J.) granted Appellee's motion and dismissed Appellants' complaint and reserved to the individual Appellants all rights to apply for administrative relief regarding the amortization period and variances for non-conforming signs. The basis of the lower court's decision was the application of New York Constitutional law as previously interpreted and applied by the New York Court of Appeals and that this type of aesthetic zoning was uniform, reasonable and a valid exercise of the police power as applied to these Appellants.

9. Thereafter, Appellants filed a notice of appeal as a matter of right on December 10, 1979, to the New York Supreme Court Appellate Division, Fourth Judicial

[1]As a procedural matter, the relief sought should have been request for an order declaring the Sign Ordinance constitutional. This procedural defect was later cured by the New York Court of Appeals' modification to that effect.

Department. The Appellants, same as before this Court, continued to claim that each of them maintained a business establishment or commercial property in the Town of DeWitt. *None of the appellants claimed, or had claimed to this point, that they had any interest, commercial, legal or otherwise in non-commercial speech.*

10. On that appeal, the Appellants advanced the following arguments:

(a) The DeWitt Sign Ordinance was not reasonably related to the public health, safety morals and general welfare of the community despite its admitted aesthetic purpose by reason of the asserted total exclusion of *commercial* free-standing on premises signs;

(b) The lower court erred in its finding that the amortization period for non-conforming signs was adequate as a matter of law;

(c) The Appellants were deprived of their right to freedom of *commercial* speech;

(d) The ordinance denied Appellants equal protection of the law as distinguishing among different forms of *commercial* uses of free-standing signs.

11. By order of the New York Supreme Court, Appellate Division, Fourth Judicial Department entered February 13, 1981, the lower court's order granting Appellees' summary judgment motion dismissing Appellants' complaint was unanimously affirmed with costs on the opinion at Special Term.

12. Thereafter, by motion returnable before the Appellate Division, Fourth Judicial Department on May 4,

1981, the Appellants sought leave from that Court for permission to appeal to the New York Court of Appeals. Said motion was in all respects denied by order of the Appellate Division, Fourth Judicial Department entered on May 8, 1981.

13. Thereafter, by notice of motion dated May 13, 1981, Appellants sought leave to appeal to the New York Court of Appeals on the same grounds as in paragraph 10 above, arguing that those grounds presented novel questions of law. Said application was opposed by Appellees on the ground that there were no novel questions of law presented and the determinations below were in conformity with the existing law of the State of New York as announced by its Appellate Courts. This application for leave to appeal was denied by the New York Court of Appeals by order dated July 6, 1981 and served with notice of entry on July 14, 1981.

14. On or about July 2, 1981, this Court rendered its decision in *Metromedia, Inc., et al., v. City of San Diego, et al.*, 453 U.S. 490 (1981) (Case Number 80-195).

15. Thereafter, and solely on the basis of this Court's decision in *Metromedia, supra,* the Appellants moved, by notice of motion dated July 31, 1981, for reargument of their motion for leave to appeal to the New York Court of Appeals. The basis for the reargument motion was threefold:

(a) The New York Court of Appeals failed to consider and apply the decision in *Metromedia, supra;*

(b) The Town of DeWitt Sign Ordinance was unconstitutional on its face in that it discriminated against non-commercial speech and certain types of lawful commercial speech;

(c) Dismissal of Appellants' complaint without a fact-finding hearing was error.

While the Appellants' first position (subparagraph 15(a) above) was necessarily novel, their position regarding facial invalidity due to restraint on *non-commercial* speech (subparagraph 15(b) above) as then first raised in the New York Court of Appeals was untimely and without basis in the record as there was and could not have been anything to support the Appellants' standing to raise the issue.

16. The Appellants' motion for reargument, and on reargument for leave to appeal was granted by the New York Court of Appeals on September 10, 1981.

17. On appeal, Appellants contended that the Ordinance was discriminatory on its face; it deprived them of the right of speech; that it was not a proper exercise of the Town's police power; and that a fact-finding hearing was necessary to determine the due-process argument of inadequate amortization. The Appellees position in the Court of Appeals was that as raised for the first time and without support in the record, Appellants' attack on the Ordinance's facial validity was untimely and without standing; that insofar as *Metromedia, supra* was applicable, it did nothing to change the existing law of New York as already applied; that there was no constitutionally protected inequal application of the law; and there was no need for a fact-finding hearing.

18. The case was argued on the merits before the New York Court of Appeals on March 23, 1981. At that time, counsel for Appellants conceded what the absence of proof in the record reflected, namely, that the Appellants had no

direct interest in any non-commercial speech nor any commercial interest in others who themselves had such an interest.[2] Counsel for Appellants also conceded that although enforcement of the amortization period had not been effectuated to date, some four years, four months after the amortization period in the Ordinance provided, none of the Appellants had inquired about or availed themselves of any administrative remedy to forestall, abate or change that period as it applied to any of the individuals as provided in the lower court's original order.

19. The New York Court of Appeals by order and opinion dated May 4, 1982, modified only the form of relief granted in the order below by declaring the Town of DeWitt Ordinance constitutional, and as so modified, unanimously affirmed with costs the order of the Appellate Division, Fourth Judicial Department. In so deciding the New York Court of Appeals found as follows:

(a) Appellants tendered no proof in admissible form sufficient to require an evidentiary hearing as to any issues of fact;

(b) Appellants, absent any direct interest in non-commercial speech or any commercial interests in those who did, lacked standing to raise any constitutional First Amendment argument of overbreadth as to the purported facial invalidity of the ordinance by regulation of *non-commercial* speech;

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[2]This is in contrast to the Appellants' newly adopted position at page 7 of their Jurisdictional Statement that "In some instances, Appellants permit the use of their premises for non-commercial, civic oriented programs, messages and promotions." There is no support for this position in the record, and it is boldly raised here for the first time in order to avoid the inevitable finding of lack of standing.

(c) The restraint as to *commercial* speech was permissible as to location and manner, citing prior decisions of that Court.

Despite ultimately having granted leave to appeal for review based solely on this Court's determination in *Metromedia, supra,* the New York Court of Appeals modification was entirely on State Law grounds as neither *Metromedia, supra,* nor any other Federal statute, constitutional provision or court decision was cited as a basis for decision.

20. On or about June 11, 1982, Appellants filed a notice of appeal purportedly pursuant to 28 U.S.C. 1257 (2) and on or about July 16, 1982, filed a Jurisdictional Statement pursuant to Rule 15 of the Rules of the Supreme Court of the United States, served upon appellees on July 26, 1982.

21. This motion is to dismiss the Appellants appeal or affirm the judgment pursuant to Rule 16.1(b) and (d).

LEGAL ARGUMENTS.

The following substantive arguments are made in support of the annexed motion to dismiss or affirm pursuant to Rule 16 of the Rules of the Supreme Court of the United States. Appellees argument is in essence, threefold. First, Appellants lack standing to attack on appeal the facial validity of the ordinance in question as it may relate to non-commercial speech; second, in any event, the judgment of the New York Court of Appeals does not now raise a substantial federal question as it rests on an adequate non-federal basis; and finally that this Court has clearly and recently determined adversely to Appellants any issues of which the Appellants do have standing.

POINT I.

The Appellants lack standing to attack the facial validity of the ordinance in question by constitutional First Amendment argument of overbreadth as they have neither a direct interest in nor a commercial interest related to others whose right they seek to assert in the non-commercial speech purportedly limited.

Each of the individual Appellants herein owns or maintains one or more business establishments or commercial properties. By and large, their names, as they appear in the caption, reflect the type and nature of their businesses. For the most part, they exist along a commercial strip of roadway known as Erie Boulevard in the Town of DeWitt. None of these businesses engages in non-commercial speech as a part of their business or enterprise.

As such, if the Appellants have standing at all to argue the facial validity of the Town of DeWitt Sign Ordinance on the basis of restriction of non-commercial speech, that standing must come from the First Amendment overbreadth doctrine. In general, that doctrine, in certain circumstances, has allowed one party to assert the denial of protection to the right of speech of another, e.g. *Bigelow v. Virginia,* 421 U.S. 809, 811 (1975); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Smith v. California,* 361 U.S. 147 (1959). Each of the cases has in common that the overbreadth application was made available to a party having a commercial interest in the protected speech, and not merely an interest in commercial speech.

Most recently, this Court fully has discussed the rule with such clarity that its inapplicability at bar is readily seen, and which deprives the Appellants of their claim to standing. In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) this Court stated at 380-381:

The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court. See, e.g. *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973); *United States v. Raines,* 362 U.S. 17, 21 (1960); *Ashwander v. TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J. concurring). The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute. See *NAACP v. Button,* 371 U.S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S., at 771 n. 24, there are 'commonsense differences' between commercial speech and other varieties. See also *id.,* at 775-781 (concurring opinion). Since advertising is linked to commercial wellbeing, it seems unlikely that such

> speech is particularly susceptible to being crushed by overbroad regulation. See *id.*, at 771-772, n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Ibid.* Since overbreadth has been described by this Court as 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' *Broadrick v. Oklahoma,* 413 U.S., at 613: we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective (Citation omitted).

Thus, in the commercial speech area, it fairly may be said that one who has and claims a general interest in commercial speech does not inherit the possible standing of a non-commercial speech party who may seek the benefit of protection of that speech, unless the claiming party is linked to the other party through some definite commercial interest.

Appellants raised, for the *first* time in the New York Court of Appeals the argument that the DeWitt Sign Ordinance was unconstitutional on its face by its prohibition of certain types of non-commercial messages while favoring certain commercial messages (See Point I Appellants' Jurisdictional Statement at 10-11). Specifically it was alleged that while certain multiple commercial users were permitted free standing signs, no non-commercial users were allowed access to such free standing signs. The thrust of this argument was that the DeWitt Sign Ordinance gives greater protection to commercial than non-commercial

speech through regulation. In this sense, the Appellants claim their argument is similar to that raised by the Appellants in *Metromedia, supra.*

The crucial distinction, of course, is that the Appellants in *Metromedia, supra*, gained their standing from their commercial interest in protected speech derived from the regulation of billboard space they sold or had available for sale for non-commercial speech content as a regular part of their business. At bar, none of the appellants have either a direct interest in non-commercial speech, or a commercial interest, direct or indirect, in non-commercial speech. As such, there is no rationale to apply the overbreadth doctrine to Appellants at bar to contest the facial validity of the Ordinance, *see Metromedia, supra* at 504 (n. 11), even assuming such an attack might be made.

Regardless of Appellants' attempts at augmenting the record upon which all prior decisions have been made nothing could change the fact that contrary to *Metromedia, supra,* there is no content-based regulation in the DeWitt Ordinance which would give rise to an attack on the facial validity of the Ordinance. Even assuming *arguendo* there was such a theoretical basis for discussion, Appellants have failed to raise any factual basis for their assertion of standing. Contrary to Appellants' attempted comparison, nothing about the Appellants' enterprises is analogous to the existence of or probability of non-commercial speech infringement in the sale of billboard space that existed in *Metromedia, supra,* for the billboard enterprise inherently touches upon questions of speech content.

However, Appellants' current claim that they were precluded below from establishing their interest in non-commercial speech (Jurisdictional Statement at 14-15) is

utterly misleading *as they never raised this issue until their motion for leave to reargue for leave to appeal to the New York Court of Appeals,* well after the issues, record and orders deciding the issues had been drawn. As the record is barren of any facts establishing a cognizable interest of Appellants in non-commercial speech, and the absence of facts is attributable solely to Appellants' failure timely to raise the issue, Appellants must be found to lack standing to contest the facial validity of the Ordinance as it relates to non-commercial speech.

POINT II.

The decision and judgment of the New York Court of Appeals rests on an adequate state law basis and does not involve a substantial Federal Question.

A review of the procedural history of this case taken together with the decision of the New York Court of Appeals, leads inevitably to the conclusion that the State determination below rests on an adequate state law basis and does not involve a substantial Federal Question. Appellants first sought leave to appeal to the New York Court of Appeals on each of the grounds herein raised, on the purported basis that said grounds raised novel questions of law. That application was denied in all respects.

That application for leave to appeal was renewed by motion for reargument, the sole basis for said second motion being this Court's determination in *Metromedia, supra.* For the purpose of determining whether *Metromedia, supra* affected New York Law or applied to the facts of this case in a way which would alter prior determinations, the New York Court of Appeals ultimately granted leave to appeal.

However, once the issues were fully briefed and argued on the merits, the New York Court of Appeals modified the form but not the legal conclusions drawn on a state law basis, and as modified, affirmed the order below. The New York Court of Appeals' decision reflects that the substantive legal conclusions were based solely on prior decisions of that Court.[3] In fact, the absence of any discussion of or citation to *Metromedia, supra* on substantive issues is indicative both that *Metromedia, supra* did not affect existing and dispositive state law and that there was no need to require a federal law basis for decision. This conclusion, we submit, is inescapable if we recall that the sole basis for review on leave to appeal was Appellants' raising the recent decision in *Metromedia, supra,* in their motion to reargue.

The remaining issues on appeal to the New York Court of Appeals were dealt with from a factual basis according to State law requirements. The New York Court of Appeals found that the Appellants had not raised any sufficient questions of fact as to either the constitutionality of the Ordinance *as applied* to their individual commercial speech situations or the reasonableness of individual application of the amortization schedule to non-conforming signs. By this determination, the New York Court of Appeals in *Syracuse Savings Bank v. Town of DeWitt, infra,* at 673, found that by the proof offered in the state procedural posture adopted by Appellants, the only issue was one of facial validity as applied to commercial speech (see Point III, *infra*), in the following language:

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[3] *See Syracuse Savings Bank v. Town of DeWitt,* 56 N.Y.2d 672, 673 where the Court cites *Suffolk Outdoor Advertising Co. v. Hulse,* 43 N.Y.2d 483 and *Modjeska Sign Studios v. Berle,* 43 N.Y.2d 468. While *Suffolk* was later affirmed by this Court at 439 U.S. 808 (1978), it is noteworthy that the Court of Appeals chose to cite as its support its own decision on the State level.

> In this action seeking a declaration that the 'sign ordinance' of the Town of DeWitt is unconstitutional, the Appellate Division affirmed Supreme Court's dismissal of the complaint on the motion of defendant town for summary judgment. Inasmuch as plaintiffs tendered no evidentiary proof in admissible form there is no evidence before us as to the practical application of the ordinance or its prospective impact in the Town of DeWitt, and no showing of facts sufficient to require an evidentiary hearing as to issues of fact. Accordingly, on the record before us the sign ordinance can be considered only in the abstract without consideration of any impact on plaintiffs. From that very narrow perspective we perceive no error made by the courts below in upholding the constitutionality and validity of the ordinance against the challenges mounted by plaintiffs. We address only the principal contentions advanced by plaintiffs in our court.

Specifically with regard to the Appellants due process argument related to the amortization period the New York Court stated in its opinion, *supra* at 673-674:

> Nor is there any proof in the record that the four-year, nine-month period between the adoption of the ordinance and its effective date created an impermissibly short amortization period.

In so finding, the Court noted in its footnote 2 that the Appellants had failed to exhaust their local and state administrative remedies, which were specifically reserved to them in the Special Term's decision granting Appellees' original motion, which in and of itself deprives Appellants of any right of review in this Court.

POINT III.

The issues raised by appellant have recently and adequately been answered by this Court's determination in *Metromedia, Inc., et al., v. City of San Diego, et al.*

A careful reading of the legal rationale for the plurality opinion in *Metromedia, supra,* and the facts upon which those legal conclusions were drawn, shows that the Appellants' position is entirely misconceived in the law and facts in that the determinations of this Court and of the Courts of the State of New York are completely consistent with the validity of the Town of DeWitt Sign Ordinance.

The plurality opinion in *Metromedia, supra* may be broken down into two parts. First, this Court found that the City of San Diego sign ordinance prohibiting "outdoor advertising display signs" (billboards) which distinguished between on-site and off-site advertising (i.e., different commercial uses) was constitutional as a proper exercise of a State's police power for safety and aesthetic purposes.[4] This initial determination in turn relied on a two part analysis.

First this Court found sufficient the San Diego public policy (safety and aesthetics) competing with the flexible First Amendment protection otherwise available to commercial speech. The Supreme Court then found a rational basis for the City's discrimination among competing *commercial* uses (i.e. on and off site uses).

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[4]At bar, there is no distinction made in the Town of DeWitt Sign Ordinance, as in San Diego, between accessory and non-accessory uses and no issue herein drawn because none of the Appellants are in the billboard or off-site advertising business for that issue to be relevant.

It was the second part of that decision, however, which found that as the same San Diego Ordinance prohibited *all non-commercial* (whether on or off site) billboard speech it was unconstitutional on its face. The essence of this Court's decision lay in an evaluation of the relationship between the police power and the relative First Amendment protection to be afforded to commercial and non-commercial speech. We believe this Court continued its rule that while commercial speech is entitled to some benefit of First Amendment protection, that protection is not necessarily the same which is to be afforded noncommercial speech as non-commercial speech has the benefit of relatively favored protection.

Initially, we turn to an evaluation of the first part of the Court's analysis resulting in a determination of constitutionality, for in the absence of Appellants' standing on the overbreadth doctrine it is this analysis which is appropriate to and controlling of the Appeal presented at bar.

The rights to be afforded commercial speech are measured by a balance between the municipalities, need and desire to exercise its police power for the safety and esthetics of its community, as against the interest *it* perceives in the value to its community of the commercial speech. Where the value of commercial speech is outweighed by lawful community needs, or may be met by alternative means, the protection afforded commercial speech must bend to accommodate the community perceived balance.

This Court in *Metromedia, supra* at 502 traced the development of commercial speech protection in the context of billboards in the following language:

> Billboards, then, like other media of communication, combine communicative and noncommunicative aspects. As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium, *Kovacs v. Cooper, supra,* but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interests with the individual's right to expression. "(A) court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 91, 97 S.Ct. 1614, 1617, 52 L.Ed.2d 155 (1977), quoting *Bigelow v. Virginia,* 421 U.S. 809, 826, 95 S.Ct. 2222, 2234, 44 L.Ed.2d 600 (1975).

and at 505:

> In *Virginia Pharmacy Board v. Virginia Consumer Council,* 4252 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), we plainly held that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection: A state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients. That decision, however, did not equate commercial and non-commercial speech for First

> Amendment purposes: indeed, it expressly indicated the contrary. See 425 U.S., at 770-773, and n. 24, 96 S.Ct., at 1830-1831. See also id., at 779-781, 96 S.Ct., at 1834-1835 (STEWART, J., concurring.)

and at 506 this Court quoted its opinion in *Ohralik v. Ohio Bar Association*, 436 U.S. 447, 456 (1978):

> 'To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.'

and also at 506, this Court finished its analysis by stating:

> Finally, in *Central Hudson v. Public Service Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we held that: "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests by its regulation." *Id.*, at 562-563, 100 S.Ct., at 2349-2350 (citation omitted). We then adopted a four-part test for determining the validity of

> government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective. *Id.*, at 563-566, 100 S.Ct., at 2350-2351.

It is with this background in mind that we look to the application of the four part test at bar to ascertain the validity of the alleged governmental restriction on freedom of commercial speech in the Town of DeWitt Ordinance, as the Court readopted from *Central Hudson v. Public Service Commission,* 447 U.S. 557 (1980). For the purpose of this argument we will assume the first step is met at bar, that being that the commercial speech in question which substantially business identification, is valid and that it concerns legal activity and is not misleading.

In the second step, a determination must be made that the ordinance seeks to implement a substantial government interest. The Court stated in *Metromedia, supra,* at 507-508, that there can no longer be doubt that the protection of urban appearance is a substantial governmental goal, *see Penn Central Transportation Co. v. New York City,* 438 U.S. 14 (1978); *Suffolk Outdoor Advertising v. Hulse,* 43 N.Y.2d 483, *aff'd* 439 U.S. 808 (1978). The Appellants have conceded that the aesthetic purpose at bar seeks to implement a substantial governmental interest (Jurisdictional Statement at 13).

A similar evaluation may be made of the next criteria which requires that the Ordinance directly advances the

stated governmental interest. At bar, the original contention by the Appellants had been that the record was inadequate to effectuate a decision on that issue. That is exactly the contention that was before this Court in *Metromedia, supra,* to which the Court spoke in these words at 509-510:

> We likewise hesitate to disagree with the accumulated, common-sense judgments of local law makers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. . . .
>
> We reach a similar result with respect to the second asserted justification for the ordinance-advancement of the City's esthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived an 'esthetic harm'. San Diego, like many other states and municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defy objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has an ulterior motive the suppression of speech, and the judgment involved herein is not unusual as to raise suspicions in itself.[3]

There was no claim at bar that the Town of DeWitt has an ulterior motive like the suppression of speech in the enactment of this ordinance.

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[3]As the Trial Court noted, there has never been any evidence of, or indication that the aim of the ordinance was other than to achieve a proper aesthetic purpose. In fact, the Appellants' papers have conceded this (Jurisdictional Statement at 13).

Now, however Appellants have asserted that the failure to *uniformly* apply the prohibition against free-standing signs "denigrates the Appellees purported interest in aesthetics and causes the Ordinance to fail the third *Central Hudson* Test (Jurisdictional Statement at 13)." The basis for this assertion, according to Appellants, is that allowing a small number of free-standing signs to the extremely limited number of malls, shopping centers and industries in the Town of DeWitt is illogical or irrational in the face of depriving the mass of individual retail stores and business their own unrestricted free-standing signs. One need only drive down Erie Boulevard as it presently exists, as the members of the Town Zoning Board have many times, to observe the distracting maze-like forest created by free-standing signs of all sizes and shapes, to realize the fallacy in Appellants' position.

This Court in *Metromedia, supra,* certainly dispelled any notion, as raised by Appellants, that a municipality is not free to distinguish among various commercial uses. In its discussion, the Court confirmed that it is indeed consistent for a municipality to properly distinguish among competing commercial uses by allowing protection to some, while denying others. The following discussion, at 510-511, is directly analogous at bar and bears repeating:

> It is nevertheless argued that the city denigrates its interest in traffic safety and beauty and defeats its own case by permitting on-site advertising and other specified signs. Appellants question whether the distinction between on-site and off-site advertising on the same property is justifiable in terms of either esthetics or traffic safety.
>
> In the first place, whether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of

> traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising. Second, *the city may believe that off-site advertising, with its periodically changing content, presents a more acute problem than does on-site advertising. See Railway Express, supra,* 336 U.S. at 110, 69 S.Ct. at 465. Third, San Diego has obviously chosen to value one kind of commercial speech—on-site advertising—more than another kind of commercial speech—off-site advertising. *The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance—on-site commercial advertising—its interests should yield. We do not reject that judgment.* (emphasis added)

Likewise, the Town of DeWitt is free to determine that the interest in identifying major shopping centers, malls and industries by free-standing signs, out-weighs or does not conflict with aesthetic purposes by reason of their extremely limited number, confined and controlled location or for any other reason.

Finally, the ordinance must reach no farther than necessary to accomplish the given objective. The Appellants' position in this regard is entirely misconceived as based upon the supposition that the DeWitt Ordinance prohibits all free-standing *and* on-site advertising signs. This position is contrary to a careful reading of the ordinance.

We note that on-site attached advertising or identification signs are freely permitted in the zones in question (see,

e.g. § 55-30 C (1)). By allowing such signs equally accessible to all commercial and non-commercial speech uses, the Town of DeWitt has provided in its judgment a reasonable alternative to unrestricted free-standing signs aimed primarily at allowing business identification. In *Metromedia, supra* at 511-512, this Court found it permissible to prohibit accessory (off-site) billboard advertisement as long as businesses were allowed on-site advertisements. At bar, it is again directly analogizable that in certain circumstances, free-standing commercial advertisement is prohibited while on-site, though attached, advertisement is permitted to allow an operative form of advertising and identification.

We next turn to the Ordinance and find that it takes cognizance, generally, of the existence of free-standing signs in the Town of DeWitt. Also, Ordinance Section 55-30 (A) (8) specifically limits the prohibition of accessory signs only to commercial enterprises, *not speech content,* and then only as not otherwise permitted. (See 55-30 E(2)).

When these subparagraphs are taken together with a further reading of the entire ordinance which nowhere specifically prohibits non-commercial use of free-standing or attached signs, the inescapable conclusion is that free-standing signs, although limited as to manner, location and nature, are permitted in the Town of DeWitt without restriction as to content. It has of course long been true that ordinances which limit only the nature, location and manner of such communications are lawful and constitutional, *Virginia State Board of Pharmacy v. Virginia Consumer Counsel, Inc.*, 425 U.S. 748 (1976); *Suffolk Outdoor Advertising v. Hulse, supra.*

The crux of this Court's determination in *Metromedia, supra* that the San Diego Ordinance was unconstitutional was found in syllogistic logic that once a municipality finds that its interest in exercising its police power ought to give way to certain commercial speech, it *must* also be true that those same police power interests must give way to non-commercial speech, as non-commercial speech always enjoys greater benefit than commercial speech. The fault found therefore in the San Diego Ordinance was that a greater protection had been given to commercial speech over noncommercial speech, as all non-commercial billboard speech content was prohibited, whereas only off-site commercial billboard speech content was prohibited. That is not at all the case in the Town of DeWitt.

The facts at bar pertinent to this discussion are simply as follows: There is nothing in the Town of DeWitt Sign Ordinance which prohibits or restricts speech content on any sign which is allowed; the converse of which is that non-commercial speech is allowed on all types of signs within all zones. Thus, there is nothing in the Sign Ordinance which impermissably regulates sign *content,* only its type and place. This is entirely different from the San Diego Ordinance, which *did* regulate sign content in that non-commercial speech use was everywhere prohibited by the San Diego Ordinance, *Metromedia, supra* at 514-515. As such, *Metromedia, supra,* although dispositive of the issues at bar, does nothing to affect the validity of the Town of DeWitt Ordinance, nor does that Ordinance now raise any issues which require clarification, amplification or review of this Court's determination in *Metromedia, supra.*

CONCLUSION.

For all the foregoing reasons, the appellants' appeal should be dismissed in all respects or in the alternative, the judgment of the New York Court of Appeals should be affirmed in all respects.

Dated: August 12, 1982
Syracuse, New York

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